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No. 94-9247

In the Supreme Court of the United States

OCTOBER TERM, 1995

CHARLES CARLISLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a district court has authority to grant a post-verdict motion for judgment of acquittal filed outside the time limits prescribed by Federal Rule of Criminal Procedure 29(c).

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 46-49) is reported at 48 F.3d 190. The opinions of the district court first denying (J.A. 15-22) and later granting (J.A. 37-44) petitioner's motion for judgment of acquittal are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1995. The petition for a writ of certiorari was filed on May 12, 1995, and was granted on September 27, 1995 (116 S. Ct. 40). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 29 provides:

Motion for Judgment of Acquittal

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion

set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

(d) Same: Conditional Ruling on Grant of Motion. If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

The texts of Federal Rules of Criminal Procedure 2, 33, 45, and 57, and the text of the All Writs Act, 28 U.S.C. 1651, are reprinted at App., *infra*, 1a-5a.

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Western District of Michigan of conspiring to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 846. He filed a post-verdict motion for judgment of acquittal outside the time limit prescribed by Federal Rule of Criminal Procedure 29(c), which the

district court denied, J.A. 23, but later reconsidered and granted, J.A. 45. The court of appeals reversed and remanded for reinstatement of the verdict and for sentencing, on the grounds that the district court had lacked authority to consider an untimely motion for a judgment of acquittal. J.A. 46-49.

1. Petitioner's jury trial began on June 30, 1993. The evidence at trial, with respect to petitioner's participation in the conspiracy, showed that, on April 10, 1993, petitioner, Dolores Rupert (petitioner's common-law wife), Amelia Ramon (Rupert's mother), and Thomas Crawford arrived at the home that petitioner shared with Rupert. Ramon and Rupert arrived by car, and Crawford, who was working as a police informant and wearing a concealed tape recorder, followed them there in a truck containing approximately 270 pounds of marijuana. Petitioner was present at the home. Rupert instructed Crawford where to park the truck, stating: "Okay, just pull out and [petitioner] says to go down the street and just park for awhile because he said he's heard over the scanner, there's some cops around here." Crawford complied with petitioner's suggestion. J.A. 16-18; Gov't C.A. Br. 3-4. Crawford then returned to the house and was introduced to petitioner. Crawford, petitioner, Rupert, and Ramon discussed where to park the truck for the evening in light of petitioner's expressed concern that police were in the area, and how to secure the truck.[1] Petitioner agreed that the truck should be parked behind Ramon's house, "right down the drive." He explained to the others that

[1] Petitioner's counsel had conceded in his opening statement that petitioner knew at the time of the offense that the truck contained marijuana. J.A. 16.

"[w]e don't want to take no chances," and that "I won't take no chances." Petitioner also inquired of the others whether a key held by Ramon unlocked a padlock on the back of the truck, and he was informed that it did. Petitioner and Ramon then drove to Ramon's house, with Crawford following in the truck bearing the marijuana. After Crawford parked the truck behind Ramon's house as suggested by petitioner, petitioner drove Ramon and Crawford to a hotel. J.A. 17-18.

Petitioner did not move during the trial for a judgment of acquittal under Federal Rule of Criminal Procedure 29(a). On July 13, 1993, the jury returned a verdict of guilty, and the court discharged it that same day. On July 23, 1993, petitioner filed a post-verdict motion for judgment of acquittal. That motion was untimely, because it was filed one day after the expiration of the seven-day period following the discharge of the jury that Rule 29(c) allows for such motions.[2] Petitioner's motion contended that, although the evidence had been sufficient to establish the existence of a conspiracy to possess and distribute marijuana, it had not been sufficient to establish that he had knowingly participated in that conspiracy. J.A. 15. The government responded that, because petitioner's motion had been filed outside the time limit prescribed by Rule 29(c), the court lacked jurisdiction

[2] Rule 29(c) provides that "a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Federal Rule of Criminal Procedure 45(a) provides that "Saturdays, Sundays and legal holidays shall be excluded" from the seven-day period. Excluding the weekend of July 17-18, 1993, the seven-day period expired on July 22, 1993.

to consider it, and, alternatively, that the evidence had been sufficient. Gov't C.A. Br. 1.

In an opinion issued on August 24, 1993, the district court did not address the timeliness of petitioner's motion, but denied that motion on the ground that the evidence had been sufficient for "a rational trier of fact [to] find beyond a reasonable doubt that [petitioner] knew about the conspiracy, and that [petitioner] knowingly and voluntarily joined the conspiracy." J.A. 18. The court explained that

> [petitioner] was more than just present during the conspiracy. He took actions to help hide the contraband from the police. He stated his intention to not "take chances." He inquired whether a key unlocked the back of the truck which contained the marijuana. And finally, * * * [petitioner's] use of the word "we" in a statement made to other conspirators during a conversation about where to put the truck full of marijuana to avoid the place [*sic*], "we don't want to take no chances," could indicate joinder with the conspiracy to a rational trier of fact. I find that [petitioner's] hearsay statement concerning the scanners, his statements evincing a desire to avoid the police, and the fact that he drove a conspirator (his common law mother-in-law) to her home, and then drove two conspirators to a hotel and dropped them off, is sufficient for a rational trier of fact to find that he knowingly and voluntarily joined the conspiracy.

J.A. 21.

2. On October 14, 1993, petitioner appeared for sentencing. Before that time, the district court had been provided with a presentence investigation report

(PSR). That report calculated petitioner's sentencing range under the Sentencing Guidelines to be 63-78 months' imprisonment and noted that, because of the amount of marijuana involved in the offense, petitioner faced a mandatory minimum sentence of five years' imprisonment under 21 U.S.C. 841(b)(1)(B). The PSR also recounted petitioner's military service in Vietnam. J.A. 35.

At the sentencing hearing, the district court announced that it was reversing its prior ruling on the sufficiency of the evidence and that it was now granting petitioner a judgment of acquittal on the ground that the evidence was insufficient to establish that petitioner had joined the conspiracy. J.A. 29-34.[3]

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[3] The court's written opinion explaining that decision summarized the evidence in the same manner as its earlier written opinion, compare J.A. 16-18 with J.A. 38-40, and the court reiterated its conclusion that the evidence had been sufficient to establish petitioner's knowledge of the marijuana-distribution conspiracy. J.A. 41. But, the court now concluded, the evidence had not established that petitioner had joined that conspiracy (J.A. 43-44):

> The government produced no evidence that [petitioner] entered into an agreement with any member of the conspiracy. * * * [H]e was clearly present during the conspiracy, and the jury could have found that he knew about it. However, in the course of hours of tape recorded conversations, no conspirators suggest that [petitioner] is involved in the conspiracy. There was no evidence that he was involved in arranging the transport of the marijuana to Michigan. In fact, Crawford testified that prior to coming to Michigan, he had not heard of [petitioner]. [Petitioner] never handled the drugs or the truck which contained them, and there was no evidence that [petitioner] was to benefit from the conspiracy. I find that [petitioner's] hearsay statement concerning the scanners, and the fact that he drove a conspirator (his common law mother-in-

After discussing its new ruling, the court noted that it had learned "for the first time when I read the presentence report that [petitioner] served his country in Vietnam in 1967 or 1968, and that while he was there he received the Bronze Star." J.A. 35. The court added that "[t]he Court doesn't meet too many Bronze Star recipients." *Ibid.* Addressing petitioner, the court concluded the hearing by saying, "on behalf of my country I thank you for your service in Vietnam. This is the end of this proceeding." J.A. 35-36.

The court later filed an opinion and judgment in support of its oral ruling. J.A. 37-45. The court acknowledged that petitioner had filed his motion for a judgment of acquittal outside of the seven-day filing deadline prescribed by Rule 29(c). The court stated, however, that

> I can conceive of no prejudice to the United States which will result from consideration of a motion that is one day late in this case. Because I believe that refusal to hear this motion would result in grave injustice, and because the Rule permits the Court to extend the deadline, I will consider this motion as if it were filed in a timely manner.

J.A. 37 n.1.

3. The court of appeals reversed. J.A. 46-49. The court noted that, under its decision in *United States* v. *Davis*, 992 F.2d 635 (6th Cir.), cert. denied, 114 S. Ct. 265 (1993), a district court lacks jurisdiction to grant a motion for judgment of acquittal filed outside

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law) to her home, and then drove two conspirators to a hotel and dropped them off, is insufficient to establish that he knowingly and voluntarily joined the conspiracy.

the time limit set by Rule 29(c). J.A. 48. In *Davis*, the court noted that Rule 29(c) requires a defendant to make a post-verdict motion for judgment of acquittal within seven days after the discharge of the jury, and that Federal Rule of Criminal Procedure 45(b) prohibits the court from retroactively extending that period. 992 F.2d at 639-640; see Fed. R. Crim. P. 45(b) (district court "may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them"). *Davis* also held that Rule 29(c) implicitly forbids a district court from *sua sponte* entering a judgment of acquittal after a verdict. It reasoned that, while Rule 29(a) expressly authorizes a district court to enter a judgment of acquittal on its own motion before a case is submitted to the jury, "there is no provision authorizing the court to act on its own initiative after the case is submitted to the jury." 992 F.2d at 639; see also J.A. 48.

Although both the government and petitioner had briefed the issue whether the evidence was sufficient, Gov't C.A. Br. 9-11; Pet. C.A. Br. 9-15, the court of appeals did not address that issue. Instead, it remanded for reinstatement of the verdict and for resentencing. J.A. 49.[4]

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[4] On June 27, 1995, while the petition for certiorari was pending, the district court convened a sentencing proceeding and sentenced petitioner, *inter alia*, to six months' imprisonment. J.A. 50-51. The court departed downward based on petitioner's military service in Vietnam and on the "aberrant" nature of petitioner's conduct in this case. 6/27/95 Sent. Tr. 14-19. The court also held that the requirements under 18 U.S.C. 3553(f) for imposing a sentence below the mandatory minimum sentence of five years' imprisonment, see 21 U.S.C. 841(b)(1)(B), had been met. At the time it imposed sentence,

SUMMARY OF ARGUMENT

The question presented in this case is whether a district court has authority to grant a defendant's post-verdict motion for judgment of acquittal filed outside the seven-day time limit prescribed by Federal Rule of Criminal Procedure 29(c). The text of the Federal Rules of Criminal Procedure answers that question. Rule 29(c) provides that "a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Rule 45(b) makes the seven-day time limit in Rule 29(c) mandatory. It states that a district court "may not extend the time for taking any action under Rule[] 29 * * *, except to the extent and under the conditions stated in [that Rule]." Those Rules, read in tandem, preclude a district court from entertaining a motion for a judgment of acquittal more than seven days after the discharge of the jury, absent prior, timely invocation of its authority.

The mandatory character of the seven-day time limit of Rule 29(c) is reinforced by this Court's decisions in *United States* v. *Smith*, 331 U.S. 469 (1947), and *United States* v. *Robinson*, 361 U.S. 220 (1960). In *Smith*, the Court construed parallel language in Federal Rule of Criminal Procedure 33 imposing a five-day time limit upon motions for a new trial. It held that Rule 33 prescribes "precise times" (331 U.S. at 473 n.2) within which the judicial power to order a new trial is confined, whether that action is

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the district court also dismissed as premature a motion pursuant to 28 U.S.C. 2255 to vacate and set aside judgment that petitioner had filed on June 2, 1995. *United States* v. *Carlisle*, No. 1:93:CR:66-02 (W.D. Mich. June 27, 1995).

taken in response to a defendant's motion or *sua sponte*. In *Robinson*, the Court held that, because the period for taking an appeal was identified in Rule 45(b) as a period that a district court could not extend, the ten-day time period for filing a notice of appeal set by the Federal Rules was mandatory and jurisdictional. Under *Robinson*, the seven-day time limit set by Rule 29(c) is similarly binding, because Rule 29 is listed in Rule 45(b) as a Rule whose time limit may not be extended except as provided in Rule 29(c) itself.

No provision of the Federal Rules of Criminal Procedure overrides Rule 29(c)'s framework governing motions for acquittal. Nor does the power to issue a writ of coram nobis authorize action outside of the time limits of Rule 29. Coram nobis is available when facts that would render a trial court's decision irregular and invalid were not brought to the court's attention, and where no alternative remedies are available. An untimely claim of evidentiary insufficiency, which could not be heard consistent with the structure of the Rules, does not meet the requirements for that extraordinary writ. The district court likewise may not use its "supervisory power" to grant an untimely Rule 29(c) motion. "Supervisory power" cannot be used when it would circumvent or conflict with the precise requirements of the Federal Rules of Criminal Procedure.

Petitioner's reliance on policy concerns to avoid enforcement of Rule 29(c)'s time limit is misplaced. If the Rule as presently drafted is deemed to work unfair or harsh results, the drafters remain free to amend it. In any event, petitioner's concerns are misguided. The time limit serves valid interests in the criminal justice system, including the prompt resolution of proceedings in the trial courts and

sparing those courts the need to decide whether particular delinquent filings were or were not justified. And the enforcement of the Rule's time limit does not foreclose review of claims of evidentiary insufficiency. It permits review of a defendant's claim in the court of appeals under a plain error standard, and leaves open collateral review when a defendant can meet the requirements for such relief.

ARGUMENT

A DISTRICT COURT LACKS AUTHORITY TO GRANT A POST-VERDICT MOTION FOR A JUDGMENT OF ACQUITTAL FILED OUTSIDE THE TIME LIMITS PRESCRIBED BY FEDERAL RULE OF CRIMINAL PROCEDURE 29(c)

Federal Rule of Criminal Procedure 29 comprehensively sets out the time limits for the making of a motion for a judgment of acquittal. Subsection (a) allows the court to enter a judgment of acquittal during the trial, "on motion of a defendant or of its own motion," at the close of the evidence offered by either side. After the jury has been discharged, the court's power to act on a motion for judgment of acquittal is defined by subsections (b) and (c). Subsection (b) allows a court to act on a motion for judgment of acquittal after the jury has been discharged if the court has reserved decision on a prior motion for judgment of acquittal. Subsection (c) permits a court to entertain such a motion when it is made or renewed within seven days after the discharge of the jury, or where the court, during that seven-day period, has extended the deadline for making such a motion.

Once seven days have expired after the jury's discharge, the structure of Rule 29 forbids a district court from entertaining a motion for judgment of acquittal, unless the court has either reserved decision on a prior, timely motion or has extended the time for making such a motion within seven days after the verdict. That Rule fosters certainty, clarity, and efficiency in the resolution of criminal proceedings in the trial court, while leaving a defendant who has not made a timely post-verdict motion for judgment of acquittal free to raise a claim of evidentiary insufficiency on appeal or, in some circumstances, on collateral review. Because petitioner did not submit a timely motion for judgment of acquittal in the district court in this case, the court of appeals correctly determined that the district court lacked jurisdiction to entertain it.[5]

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[5] That holding is consistent with the approach taken in *United States* v. *Stevens*, 978 F.2d 565, 569 (10th Cir. 1992); *United States* v. *Hocking*, 841 F.2d 735, 736-737 (7th Cir. 1988); *United States* v. *Fagan*, 821 F.2d 1002, 1011-1012 & n.7 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988); *United States* v. *Godoy*, 678 F.2d 84, 88 (9th Cir. 1982), cert. denied, 464 U.S. 959 (1983); and *United States* v. *Johnson*, 487 F.2d 1318, 1321 (5th Cir.), cert. denied, 419 U.S. 825 (1974). But see *United States* v. *Coleman*, 811 F.2d 804, 806-807 (3d Cir. 1987); *United States* v. *Giampa*, 758 F.2d 928, 934-935, 936 n.1 (3d Cir. 1985); and *Arizona* v. *Manypenny*, 672 F.2d 761, 766 (9th Cir.), cert. denied, 459 U.S. 850 (1982) (all suggesting, in factually distinguishable contexts, the existence of some inherent power to consider an untimely motion); see also *United States* v. *DiBernardo*, 880 F.2d 1216, 1225 n.4 (11th Cir. 1989) (dicta in case involving Rule 33).

A. Rule 29(c) And Rule 45(b) And This Court's Decisions Establish That A District Court Lacks The Authority To Grant An Untimely Motion For Judgment Of Acquittal

1. When interpreting a statute or a Federal Rule, this Court looks "first and foremost to its text." *United States* v. *Alvarez-Sanchez*, 114 S. Ct. 1599, 1603 (1994); see *Libretti* v. *United States*, 116 S. Ct. 356, 362 (1995). The texts of Rule 29 and Rule 45(b), read together, make clear that a district court lacks jurisdiction to consider a defendant's motion for judgment of acquittal made more than seven days after the discharge of the jury, except where the court has extended that deadline before the seven-day period has expired. Rule 29(c) provides that a defendant's motion for judgment of acquittal "may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Rule 45(b), which governs the enlargement of time limits under the Federal Rules of Criminal Procedure, provides that the district court "may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them." Thus, a district court may not retroactively extend the seven-day deadline prescribed by Rule 29(c) in order to convert an out-of-time motion into a timely one under the Rule.

Nor may the district court treat the defendant's untimely motion as one made by the court, and address it on that basis. The text of Rule 29 leaves no room for a district court to act on its own initiative to enter a judgment of acquittal more than seven days after the discharge of the jury, in the absence of the

prior reservation of such a motion or the extension of the time for it to be made. Rule 29(a), which applies to a motion made *before* submission of the case to the jury, refers explicitly to the court's power to act "of its own motion" to enter a judgment of acquittal. Rule 29(c), which governs the period *after* the discharge of the jury, does not refer to action initiated by the court. It does, however, describe procedures that govern any "motion for a judgment of acquittal." The most reasonable construction of the Rule is thus that it includes action by the court, as well as the defendant, to make or renew a motion for a judgment of acquittal after the return of the jury's verdict. Under that construction, the court's power to act of its own motion after the verdict is necessarily limited to the seven-day period established by Rule 29(c). A court may therefore enter a judgment of acquittal, or extend the time for consideration of that action, within seven days of the discharge of the jury. The court retains no power to act for an indefinite time thereafter.[6]

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[6] It is possible, in the alternative, to read the term "motion" in Rule 29(c) to refer only to a motion by the defendant. Under that reading, Rule 29(c)'s omission of any reference to the court's own motion, juxtaposed against Rule 29(a)'s express authorization of the court's own motion, implies that after the discharge of the jury the court lacks any power to enter a judgment of acquittal on its own initiative (except when, pursuant to Rule 29(b), the court had reserved ruling on its own pre-verdict motion). See *United States* v. *Davis*, 992 F.2d 635, 639 (6th Cir.) (adopting that interpretation), cert. denied, 114 S. Ct. 265 (1993). Under that reading of Rule 29(c), absent a reserved motion at trial, a district court may never act "of its own motion" to acquit a defendant after the discharge of the jury.

2. This Court's decisions in *United States* v. *Smith*, 331 U.S. 469 (1947), and *United States* v. *Robinson*, 361 U.S. 220 (1960), strongly support the conclusion that a district court lacks jurisdiction to grant a post-verdict motion for judgment of acquittal filed outside the time limits prescribed by Rule 29(c). In *Smith*, this Court held that a district court lacks power to order a new trial outside the time limit set by Federal Rule of Criminal Procedure 33. That Rule provided—in language paralleling that of Rule 29(c)—that a motion for a new trial based on grounds other than newly discovered evidence "shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period." 331 U.S. at 472.[7] The defendant in *Smith* had moved for a new trial, but that motion had been denied, and the conviction had been upheld on appeal. Following affirmance of the defendant's conviction on appeal, however, the district court *sua sponte* issued an order granting a new trial. The court of appeals denied the government's petition for writs of mandamus and prohibition to vacate the new trial order. *Id.* at 470-471.

This Court reversed, rejecting the defendant's argument that, "because the literal language of the Rule places the five-day limit only on the making of the motion, it does not limit the power of the court later to grant the motion." 331 U.S. at 473. At

[7] Rule 33 was amended in 1966 to increase to seven days the time period within which a motion for a new trial based on grounds other than newly discovered evidence shall be made. See Fed. R. Crim. P. 33 ("A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.").

common law, the Court noted, a court's power over its judgments expired with the "term of court." While an earlier rule of procedure had given a defendant three days within which to move for a new trial, and while the Federal Rules had extended that time to five days (Rule 33) and concomitantly repealed the term-of-court limitation (Rule 45(c)), the Federal Rules had not expanded the power of the trial court "to grant new trials on its own motion * * * indefinitely." *Id.* at 473-474. Rather, the Court held, the Federal Rules prescribe "precise times" and "constant time periods" within which the judicial power to order a new trial must be "confine[d]." *Id.* at 473 n.2.[8]

The Court in *Smith* also observed that policy considerations militate against holding "that the court has a continuing power on [its] own initiative to grant what the defendant has not the right to go into open court and ask." 331 U.S. at 475. First, a rule "which deprived a judge of power to do what was asked when request was made by the person most concerned, and yet allowed him to act without petition," would raise serious constitutional issues, which counseled against such an interpretation. *Id.* at 474. Furthermore, the Court observed,

> [t]o approve the practice followed in this case would almost certainly subject trial judges to private appeals or application by counsel or friends of one convicted. *We think that expiration of the time within which relief can openly be asked of*

[8] See 3 Charles Alan Wright, *Federal Practice and Procedure (Criminal)* § 558, at 360 (2d ed. 1982) ("The time limitations of Rule 33 are jurisdictional."); *id.* at 361 n.1 (collecting cases); cf. *Herrera* v. *Collins*, 113 S. Ct. 853, 865 (1993) ("We have strictly construed the Rule 33 time limits.").

> *the judge, terminates the time within which it can properly be granted on the court's own initiative.* If the judge needs time for reflection as to the propriety of a new trial, he is at liberty to take it before denying a timely made motion therefor.

Id. at 475 (emphasis added).[9]

In *Robinson*, the Court held that the time limit within which a defendant may file a notice of appeal may not be extended beyond the ten-day period following entry of judgment set by Federal Rule of Criminal Procedure 37(a)(2). The lower courts in *Robinson* had held that, because the defendants' failure to file notices of appeal until 11 days after that deadline resulted from "excusable neglect," the notices of appeal would be deemed valid. This Court reversed, relying on Rule 45(b). Rule 45(b), the Court

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[9] The Court in *Smith* noted a third policy consideration supporting its reading of Rule 33: the interest in ensuring that appellate courts review only those district court decisions that are final. If a district court were empowered, after an appeal, to "set aside all that was the basis of appeal," as had occurred in *Smith* itself, the Court noted that finality would not be assured. 331 U.S. at 474; see *ibid.* ("It is not the function of appellate courts to review tentative decisions of trial courts"). Noting that third policy justification, petitioner argues (Br. 22) that *Smith* bars only those new trial orders made "after the appeal [has been] decided." *Smith*, however, held more broadly that a district court's power to order a new trial in cases not involving newly discovered evidence "terminates" not upon the onset of appellate review, but upon the expiration of the period within which a defendant could move for such relief under Rule 33. See 331 U.S. at 475. See also *Robinson*, 361 U.S. at 225-226 (under *Smith*, "the power of the District Court *sua sponte* to grant a new trial under Rule 33 is limited to the time fixed in that Rule").

noted, provided that certain actions could be done out of time where the "failure to act was the result of excusable neglect." The Court emphasized, however, that Rule 45(b) identified specific circumstances in which district courts could not allow acts to be done out of time:

> [T]he court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, *or the period for taking an appeal.*

361 U.S. at 223 (quoting Fed. R. Crim. P. 45(b)) (emphasis added). Because recognizing a late notice of appeal "'enlarge[s]' the period for taking an appeal," the Court held, it was forbidden by Rule 45(b). *Id.* at 224. Thus, "the 10-day period prescribed by Rule 37(a)(2) is mandatory and jurisdictional." *Ibid.*[10]

The Court in *Robinson* observed that to recognize an untimely notice of appeal would be inconsistent with *Smith*, because *Smith* also involved a Rule with a time limit covered by Rule 45(b)'s express bar against enlargement. 361 U.S. at 225-226. If an untimely notice of appeal were held to confer jurisdiction of the appeal based on "excusable neglect," it would follow that a finding of excusable neglect would permit delayed action under the other Rules listed in Rule 45(b)—Rules 33, 34, and 35. That result would contravene *Smith*'s holding that Rule 33 "prescribed

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[10] Rule 37 was abrogated effective July 1, 1968, and the ten-day deadline for filing a notice of appeal in criminal cases is today mandated by Federal Rule of Appellate Procedure 4(b). Relying on *Robinson*, this Court has held that the time limits set by Rule 4 are "mandatory and jurisdictional." *Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 264 (1978) (quoting *Robinson*, 361 U.S. at 229).

precise times within which the power of the courts must be confined," whether that power is wielded *sua sponte* or in response to a defense motion. *Robinson*, 361 U.S. at 225-226.

As the Sixth Circuit has noted, the "decisions in *Smith* and *Robinson* leave little doubt concerning the proper resolution of the question" of whether a district court has authority to grant an untimely motion for judgment of acquittal. *United States* v. *Davis*, 992 F.2d 635, 639 (6th Cir.), cert. denied, 114 S. Ct. 265 (1993). When *Smith* and *Robinson* were decided, Rule 29 was not listed in Rule 45(b). In 1966, however, when Rule 29(c) was promulgated, Rule 45(b) was amended to add Rule 29 to the list of Rules with regard to which courts could not extend the time limit except as provided in those Rules. See Fed. R. Crim. P. 45 advisory committee's note (1966 amendment). Under *Robinson*, Rule 45(b)'s inclusion of Rule 29 means a district court cannot grant a defendant's untimely motion for judgment of acquittal, because the seven-day time limit in Rule 29, like the time limit at issue in *Robinson*, is "mandatory and jurisdictional." 361 U.S. at 224. Permitting delayed action under Rule 29 would also conflict with *Smith*'s holding that the parallel wording in Rule 33 "prescribed precise times within which the power of the courts must be confined." *Id.* at 226.

3. The history of Rule 29 and Rule 45 confirms that textual understanding. In 1940, Congress authorized this Court to promulgate Rules of Criminal Procedure that would become effective upon "passive acceptance" by Congress; this Court did so with the aid of an Advisory Committee. *Robinson*, 361 U.S. at 227. The Advisory Committee's preliminary draft of Rule 29, issued in May 1943,

contained two sections: Section (a) allowed motions for acquittal to be granted "at any time after the evidence on either side is closed"; Section (b) provided that, if the court denied such a motion, the defendant could "renew[]" that motion "within 10 days after the jury is discharged."[11] Based on suggestions from the bench and bar, later versions of the Rule (including the final version) made the time limits under the Rule more stringent. In Section (a), the words "at any time" were deleted, making clear that the court was required either to reserve the motion or to act on it before submitting the case to the jury. In Section (b), the ten-day time period was shortened to match the five-day period then allowed for motions for new trial under Rule 33.[12] The Advisory Committee's decision to strike the language allowing a motion for judgment of acquittal to be made "at any time" and to fix instead a five-day time limit following discharge of the jury is persuasive evidence that the Committee expected the time limit it set for post-verdict motions to be mandatory, not precatory. The 1966 amendment that increased the time limits under Rule 29(c) and Rule 33 to the current limit of seven days, see Fed. R. Crim. P. 29 advisory committee's note (1966 amendment), is also indicative of a studied selection of a definite time period. That deliberate approach is inconsistent with petitioner's view that Rule 29(c)'s time limit is meant to be "flexibly applied" (Br. 10).

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[11] See Preliminary Draft of Fed. R. Crim. P. 27 (May 1943), *reprinted in* 1 *Drafting History of the Federal Rules of Criminal Procedure* 125 (Madeline J. Wilken and Nicholas Triffin eds., 1991) [hereinafter *Drafting History*]. Early drafts of the Rule were numbered differently from the final Rule.

[12] See Second Preliminary Draft of Fed. R. Crim. P. 31 (Feb. 1944), *reprinted in* 4 *Drafting History* 121.

The history of Rule 45 points to the same conclusion. At common law, a court's authority over its judgments expired with the term of court. See *Smith*, 331 U.S. at 473; *United States* v. *Mayer*, 235 U.S. 55, 67 (1914).[13] Rule 45 reflected a decision to "abolish[] the expiration of a term of court as a time limitation for the taking of any step in a criminal proceeding" and to substitute "specific time limitations" in its place. See Fed. R. Crim. P. 45 advisory committee's note (1944 adoption). The purpose of establishing fixed time limits was to avoid the uncertainty inherent in the term-of-court concept. See *ibid.*; *United States* v. *Keane*, 852 F.2d 199, 202 (7th Cir. 1988) (because "term-of-court" often referred to the "period that lasted until the judges moved on to some other city," the term limitation produced "erratic results," depending on how late in the term the judgment had been rendered), cert. denied, 492 U.S. 928 (1989). As this Court has explained:

> The Rules, in abolishing the term rule, did not substitute indefiniteness. On the contrary, precise times, independent of the term, were prescribed. *The policy of the Rules was not to extend power indefinitely but to confine it within constant time periods.* See Notes to Rules of Criminal Procedure, Rule 45.

Smith, 331 U.S. at 473 n.2 (emphasis added).

In 1966, Rule 29 was added to the Rules listed in Rule 45(b), and the history of that amendment reflects a recognition that *Smith* and *Robinson* would render

[13] In *Mayer*, the Court recognized, as an exception to that rule, that a court possessed power in a subsequent term "to correct inaccuracies in mere matters of form, or clerical errors." 235 U.S. at 67. That exception is inapplicable here.

the seven-day time limit in Rule 29(c) mandatory. The Advisory Committee's Note to Rule 29(c) states that the power to extend the seven-day time limit in that Rule is patterned on Rule 33, the Rule at issue in *Smith*. See Fed. R. Crim. P. 29 advisory committee's note (1966 amendment).[14] The Advisory Committee's Note regarding Rule 33 likewise refers back to Rule 29(c), and cites the decision in *Smith*. See Fed. R. Crim. P. 33 advisory committee's note (1966 amendment). Finally, the Advisory Committee's Note to Rule 45 cites *Robinson*, and states that Rule 45(b) "makes it clear that the only circumstances under which extensions [of time] can be granted under Rule[] 29 * * * are those stated in" that Rule itself. Fed. R. Crim. P. 45 advisory committee's note (1966 amendment). The drafters of Rule 29(c) and Rule 45(b) thus expressed their intention that the seven-day time limit be binding and jurisdictional. See 4 Mark S. Rhodes, *Orfield's Criminal Procedure under the Federal Rules* § 29:2, at 503-508 (2d ed. 1987) (reviewing drafting history of Rule 29(c)).

[14] The Reporter's Comment on the January 1961 First Tentative Draft of Rule 29(c) likewise noted that, "[i]f any change is made in the 5-day period under Rule 33, this rule should be changed to conform." CIS Records of the Judicial Conference of the United States, Committee on Rules of Practice and Procedure, 1935-1988—Committee on Criminal Procedure, CM 3710-70 (microfiche).

B. There Is No Source Of Judicial Authority To Override The Time Limit Mandated By Rule 29(c)

Petitioner does not argue that the text or history of Rule 29 or Rule 45 support, or are even consistent with, his claim (Br. 8) that a district court has the "discretion" to enter a judgment of acquittal when no timely motion for such relief has been made within seven days of the discharge of the jury. Instead, he bases his claim for "flexible" application of Rule 29(c)'s time limits on other rules or statutes (Br. 10), and on the district court's "inherent supervisory power" (Br. 30). None of those sources gives a court power to disregard the time limits of Rule 29(c).

1. *Federal Rule of Criminal Procedure 2*: Petitioner relies first (Br. 10-11) on Federal Rule of Criminal Procedure 2, which provides that the Rules of Criminal Procedure are "intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Nothing in the very general language of Rule 2 suggests that that Rule was intended to override the time limit prescribed by Rule 29(c) and reinforced by Rule 45(b). Nor does the Court's reliance on Rule 2 in *Fallen* v. *United States*, 378 U.S. 139 (1964), suggest that that Rule is assigned the office of permitting discretionary deviation from time limits as a matter of course. In *Fallen*, the Court determined, in the highly unusual circumstances of that case, that a defendant's untimely notice of appeal did not deprive the court of appeals of jurisdiction over his case. The Court noted that, while "the timely filing of a notice

of appeal is a jurisdictional prerequisite to the hearing of the appeal," under Rule 2, the Rules must be "approached with sympathy for their purpose." *Id.* at 142. The Court explained that the extraordinary nature of the case, and in particular that Fallen was incarcerated, ill, deprived of visitors, and forced against his will to proceed pro se, and that (before expiration of the ten-day deadline) Fallen had submitted a notice of appeal to prison authorities for mailing, required that his notice of appeal be accepted. *Id.* at 142-143.[15] Four Justices concurred, taking the position that "a defendant incarcerated in a federal prison and acting without the aid of counsel" in fact has timely filed a notice of appeal when he delivers it to prison authorities within the ten-day period provided in Rule 37. *Id.* at 144 (Stewart, J., concurring). "In other words," the concurring Justices concluded, "in such a case the jailer is in effect the clerk of the District Court within the meaning of Rule 37." *Ibid.*[16]

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[15] *Fallen*'s holding prompted an amendment to then-Rule 37 that allowed a district court to extend the time to file a notice of appeal for up to 30 days upon a finding of "excusable neglect." The substance of that amendment is today embodied in Federal Rule of Appellate Procedure 4(b). No comparable provision has ever been added to Rule 29; rather, the drafters of the Rules placed in Federal Rule of Criminal Procedure 45 stringent limits against the extension of the time period prescribed by Rule 29(c) except as that Rule itself provides.

[16] In *Houston* v. *Lack*, 487 U.S. 266 (1988), the Court adopted the approach taken by the *Fallen* concurrence and held that a pro se prisoner complies with the notice-of-appeal deadline if, within the time period fixed by the Federal Rules, he "deliver[s] the notice to prison authorities for forwarding to the District Court." *Id.* at 270. The Court noted that *Fallen* had rested on the recognition that "[t]he situation of prisoners

The narrow holding in *Fallen* does not assist petitioner. Unlike the defendant in that case, petitioner was represented by counsel at all stages of the case, and made no effort before the expiration of the deadline in Rule 29(c) to file a motion for judgment of acquittal in the district court. *Fallen* establishes no general principle that, under Rule 2, deadlines fixed by the Rules of Criminal Procedure should be applied "flexibly" so as to excuse his delinquency (Br. 10). That reading of *Fallen* cannot be squared with the decision in *Berman* v. *United States*, 378 U.S. 530 (1964) (per curiam), which was decided the same day as *Fallen*. In *Berman*, the defendant's notice of appeal had been due on a Saturday, and his attorney timely prepared the notice and asked an associate to file it on the preceding Friday. The associate, however, "left the office with a fever and went home to bed, where he stayed until late Sunday. Because of the associate's illness, the notice was not filed on Saturday; instead, it was filed Monday morning." *Id.* at 531 (Black, J., dissenting). The court of appeals dismissed the appeal as untimely, and this Court summarily affirmed, citing *Robinson*. See *id.* at 530. In his dissenting opinion, Justice Black noted that the notice of appeal deadline was being enforced even

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seeking to appeal without the aid of counsel is unique" (*ibid.*), because such a pro se prisoner's "control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access." *Id.* at 271-272. The decision in *Houston* gave rise to Federal Rule of Appellate Procedure 4(c), which provides that in cases involving "an inmate confined in an institution," the "notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing." See Fed. R. App. P. 4 advisory committee's note (1993 amendment).

though "the sole reason for cutting off the defendant's right of appeal * * * is the fact that, after the defendant has decided to appeal, the lawyer to whom he entrusts the duty of physically transporting his notice of appeal * * * fails to get it there because he is taken ill." *Id.* at 532; see also *Santana* v. *United States*, 385 U.S. 848 (1966) (Black, J., dissenting from denial of certiorari); *Temple* v. *United States*, 386 U.S. 961 (1967) (Black, J., dissenting from denial of certiorari). The disposition of *Berman* establishes that *Fallen* rests principally on the incarcerated defendant's involuntary pro se status. It has no application to a case such as this, where a represented defendant fails to meet a jurisdictional deadline as the result of his counsel's lapse.

2. *Federal Rule of Criminal Procedure 57*: Petitioner also relies (Br. 15, 17) on *Arizona* v. *Manypenny*, 672 F.2d 761, 765-766 (9th Cir.) (Kennedy, J.), cert. denied, 459 U.S. 850 (1982), which invoked both Federal Rule of Criminal Procedure 57 and the "inherent power" of a district court in support of its holding that, more than seven days after the discharge of the jury, a court may revisit its denial of a timely filed motion for judgment of acquittal.[17] To the extent that petitioner relies on Rule 57, that reliance is misplaced. Rule 57 provides that, "[i]n all cases not provided for by rule, the district judges and magistrate judges may regulate their practice in any manner not inconsistent with

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[17] *Manypenny* was decided before *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), which, as we discuss at page 32, *infra*, holds that a district court may not exercise its supervisory power where doing so would conflict with a Federal Rule of Criminal Procedure.

these rules or those of the district in which they act." Rule 57 does not authorize a court to grant an untimely motion for judgment of acquittal because the time limit for such motions *is* "provided for by rule"—Rule 29(c)—and because granting an untimely motion would be "inconsistent" with that Rule.

As the Advisory Committee's Note to Rule 57 explains, while the Federal Rules of Criminal Procedure "are intended to constitute a comprehensive procedural code for criminal cases in the Federal courts," Rule 57 allows individual judges or districts to set their own practices on "matters of detail" not addressed by those Rules, such as "the mode of impaneling a jury, the manner and order of interposing challenges to jurors, the manner of selecting the foreman of a trial jury, the matter of sealed verdicts, the order of counsel's arguments to the jury, and other similar details." Fed. R. Crim. P. 57 advisory committee's note (1944 adoption).[18] The time limit prescribed by Rule 29(c) is part of that nationally applicable procedural code, and hence is not a "matter of detail" subject to the discretion of a district judge. See *Miner* v. *Atlass*, 363 U.S. 641, 650 (1960) (purpose of requiring particular statutory procedures to be used to adopt Federal Rules was to ensure that "basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such

[18] The order of closing arguments is today prescribed by Federal Rule of Criminal Procedure 29.1, which became effective in 1975. Rule 29.1 "reflects the Advisory Committee's view that it is desirable to have a uniform federal practice" in this area. See Fed. R. Crim. P. 29.1 advisory committee's note (1974 addition).

consideration affords"). Indeed, if Rule 57 were thought to leave a district judge discretion to enlarge the time period within which a post-verdict motion for judgment of acquittal could be filed, it would also presumably allow a judge to contract that time period —an action plainly inconsistent with Rule 29(c).[19]

3. *The All Writs Act (28 U.S.C. 1651)*: Petitioner also claims (Br. 23-25, 30) that a district court has authority under the All Writs Act, 28 U.S.C. 1651, to treat an untimely motion for judgment of acquittal as a petition for a writ of coram nobis, and to issue such a writ acquitting the defendant.[20] The traditional

[19] Rule 57 also allows a district court, after engaging in appropriate notice and comment procedures, to "make and amend rules governing its practice not inconsistent with these rules." Similarly, under the Rules Enabling Act, 28 U.S.C. 2071(a), "all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business," so long as those rules are "consistent with Acts of Congress and rules of practice and procedure prescribed under" 28 U.S.C. 2072, another section of the Rules Enabling Act. As we have noted, any local rule altering the time limits governing motions for judgments of acquittal would be inconsistent with Rule 29(c) and hence void. In any event, the district in which petitioner was convicted has not adopted a rule authorizing a court to grant a motion for judgment of acquittal filed more than seven days after discharge of the jury. See Local Rules of Practice and Procedure, United States District Court for the Western District of Michigan (Aug. 1991).

[20] The All Writs Act, 28 U.S.C. 1651, provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

scope of the coram nobis remedy does not extend to that situation. In any event, the coram nobis remedy may not be employed in a manner that effectively overrides a Federal Rule.

The writ of coram nobis was available at common law solely to correct errors of fact "of the most fundamental character" that had not been brought to the attention of the trial court and that "rendered the proceeding itself irregular and invalid." *United States* v. *Addonizio*, 442 U.S. 178, 186 (1979); see *United States* v. *Morgan*, 346 U.S. 502, 507 & n.9, 512 (1954); *Mayer*, 235 U.S. at 68; Yale Kamisar, Wayne R. LaFave, & Jerold H. Israel, *Modern Criminal Procedure* 1624-1625 (1994). For example, the writ could issue to bring before the court such heretofore unknown errors as the fact that "the defendant, being under age, appeared by attorney, or the plaintiff or defendant * * * died before verdict." *Mayer*, 235 U.S. at 68; see also *Morgan*, 346 U.S. at 508. In *Morgan*, this Court held that, under the All Writs Act, federal courts retain power to issue writs of coram nobis. 346 U.S. at 508. But, the Court noted, the writ is an "extraordinary remedy, available only under circumstances compelling such action to achieve justice," *id.* at 511, and may issue only where "no other remedy [is] available" and where there are "sound reasons existing for failure to seek appropriate earlier relief," *id.* at 512; see also *id.* at 511 (noting view at common law that "failure to use a known remedy at the time of trial may be a bar to subsequent reliance on the defaulted right").

In light of those principles, the coram nobis remedy is unavailable to petitioner, for several reasons. First, petitioner does not claim that proof of an extra-record fact would demonstrate the invalidity of his

conviction. Rather, petitioner claims that the evidence at trial was insufficient, a claim that, unlike the paradigmatic coram nobis claim, does not concern "matters of fact which had not been put in issue or passed upon." *Mayer*, 235 U.S. at 68. Second, petitioner does not attack "the validity and regularity" of the judgment itself, *Morgan*, 346 U.S. at 507 (internal quotation marks omitted), but, instead, the evidentiary basis for that judgment. See *Moody* v. *United States*, 874 F.2d 1575, 1576-1577 (11th Cir. 1989) (claim that newly discovered evidence demonstrates defendant's innocence "is not cognizable in a coram nobis proceeding" because it does not involve "a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid"), cert. denied, 493 U.S. 1081 (1990). Third, other remedies are available to petitioner, including the right to challenge the sufficiency of the evidence on direct appeal and to petition for collateral relief under 28 U.S.C. 2255. See pages 37-39, *infra*.

Finally, a writ of coram nobis may not be utilized to override a procedure mandated by statute or Federal Rule, such as Rule 29(c)'s time limit. As this Court has explained:

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with

> statutory procedures appears inconvenient or less appropriate.

Pennsylvania Bureau of Correction v. *United States Marshals Service*, 474 U.S. 34, 43 (1985); see *Smith*, 331 U.S. at 475 n.4 (in light of enactment of Federal Rules of Criminal Procedure, "it is difficult to conceive of a situation in a federal criminal case today where th[e] remedy [of coram nobis] would be necessary or appropriate"); *id.* at 471 ("The power of the District Court to make such an order [granting a new trial] turns entirely on the Rules of Criminal Procedure.").

4. "*Inherent Supervisory Power*": Finally, petitioner argues (Br. 9, 30) that a district court has "inherent supervisory power" to relieve a defendant "from the strict operation of the time limits" prescribed by Rule 29(c).[21] That claim, however, is foreclosed by this Court's decision in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), which holds that a district court may not exercise its supervisory power where doing so would "circumvent" or "conflict with" a Federal Rule of Criminal Procedure. *Id.* at 254. At issue in *Bank of Nova Scotia* was whether a district court could use its supervisory powers to dismiss an indictment for misconduct before the grand jury that did not prejudice the defendant, notwithstanding the direction in

[21] While several courts have suggested that the "supervisory powers" of the federal courts are conferred by the All Writs Act, most have concluded that such powers derive from Article III of the Constitution. Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1464 (1984).

Federal Rule of Criminal Procedure 52(a) that a district court must "disregard[]" any error that does not "affect substantial rights." The Court held it could not, because of the established principle that "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions." 487 U.S. at 254 (quoting *Thomas* v. *Arn*, 474 U.S. 140, 148 (1985)). That principle, the Court held, applies with equal force where the exercise of supervisory power would conflict with a Federal Rule of Criminal Procedure (*id.* at 255 (quoting *United States* v. *Payner*, 447 U.S. 727, 736 (1980))):

> Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions. The balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked "because a court has elected to analyze the question under the supervisory power."

See *id.* at 254 ("To allow otherwise 'would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.'") (quoting *Payner*, 447 U.S. at 737); *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 51 (1991) ("a district court [may] not rely on its supervisory power as a means of circumventing the clear mandate of a procedural rule"); *United States* v. *Hasting*, 461 U.S. 499, 505 (1983) (supervisory power cannot justify the reversal of a conviction based on nonprejudicial prosecutorial misconduct, because to do would

conflict with the requirement to overlook harmless error in Fed. R. Crim. P. 52); cf. *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959). A district court likewise may not use its supervisory power to override Rule 29(c)'s mandatory time limit for filing a post-verdict motion for judgment of acquittal.[22]

The exercise of supervisory authority to extend Rule 29(c)'s time limit would be particularly inappropriate in light of the scant precedent at common law for such action. Courts at common law did not enjoy the power to enter a judgment inconsistent with a jury's verdict in a criminal case. In England, after the jury found the defendant guilty, courts could recommend a royal pardon if they concluded that the evidence was insufficient, but could not themselves enter a post-verdict judgment of acquittal or dismissal. *Ex parte United States*, 101 F.2d 870, 875-876 & n.15 (7th Cir.), aff'd by an equally divided Court *sub nom. United States* v. *Stone*, 308 U.S. 519 (1939) (per curiam); 1 James Fitzjames Stephen, *A History of the Criminal Law of England* 311-313 (1883). Early decisions in the United States

[22] The decisions on which petitioner relies (Br. 9-14) recognize that supervisory power may be exercised only where no statute or Federal Rule has supplied a contrary rule of decision. In *United States* v. *Nobles*, 422 U.S. 225 (1975), the Court recognized a court's inherent authority to order the disclosure of a defense witness's written statements, but only after concluding that the exercise of that authority would not conflict with the Fifth Amendment, the Jencks Act (18 U.S.C. 3500), Federal Rule of Criminal Procedure 16, or the work-product doctrine. 422 U.S. at 233-240. See also *United States* v. *Hasting*, *supra* (discussed in text). Petitioner's reliance (Br. 14) on *Brock* v. *Pierce County*, 476 U.S. 253 (1986), is misplaced, because *Brock* involved the construction of a statutory time limit, not the exercise of supervisory power.

recognized a court's authority to direct a jury to acquit the defendant, see *Sparf* v. *United States*, 156 U.S. 51, 99-100, 105 (1895); *United States* v. *Fullerton*, 25 Fed. Cas. 1225, 1226 (C.C.S.D.N.Y. 1870) (No. 15,176), but few if any reported decisions from this period support entry of a judgment of acquittal following a guilty verdict. See Note, *Reservation of Motion for Directed Verdict in Federal Criminal Trials*, 49 Yale L. J. 733, 735, 736 & n.27 (1940); but see *State* v. *Meen*, 171 Wis. 36 (1920). Nor was the power to do so recognized by the leading treatises on criminal law and procedure of that era. See, *e.g.*, 1 Elijah N. Zoline, *Federal Criminal Law and Procedure* §§ 457-466, at 383-389 (1921); William L. Clark, Jr., *Handbook of Criminal Procedure* §§ 181-187, at 562-584 (2d ed. 1918); 2 Joel Prentiss Bishop, *New Criminal Procedure* §§ 1263-1288, at 1082-1126 (2d ed. 1913).

Not until 1939, seven years before the effective date of the Federal Rules of Criminal Procedure, did a federal court of appeals, in *Ex parte United States*, *supra*, hold that a district court could reserve ruling on a motion for directed verdict of acquittal, and later grant that motion after the jury convicted the defendant. In that case, the Seventh Circuit held that, while no statute authorized a district court to take such action, "the absence of express prohibitive legislation" left room for federal courts to enlarge "the procedures [governing directed verdicts] known at common law." 101 F.2d at 876. That decision was affirmed by an equally divided Supreme Court, and has been codified today in Rule 29(b). See Fed. R. Crim. P. 29 advisory committee's note (1944 adoption). We are aware, however, of no cases before the adoption of the Federal Rules of Criminal Procedure

granting a motion for acquittal first made after the verdict. Exercise of supervisory authority to grant such relief based on a motion more than seven days after discharge of the jury would therefore not only be at odds with Rule 29(c), but without precedent at common law.

C. Rule 29(c)'s Time Limit Advances Valid Systemic Interests While Preserving A Defendant's Right To Challenge The Sufficiency Of The Evidence On Appeal

Petitioner, finally, argues that enforcing Rule 29(c)'s seven-day deadline is ill-advised policy. He claims that a flexible treatment of that time limit (1) is needed "to ensure that an innocent man is not found guilty" and thereby to "preserve judicial integrity" (Br. 9); and (2) would not prejudice the government where the defendant has missed Rule 29(c)'s time limit by only one day (Br. 19).

1. As an initial matter, petitioner's policy arguments in favor of a flexible deadline are better addressed in a rule-making proceeding than in litigation over the meaning of the Rule as written. See note 15, *supra* (noting that amendment was made to Federal Rule of Criminal Procedure 37 to incorporate the concept of "excusable neglect"). Rule 29(c) reflects a balance of competing policy considerations, and it must be heeded unless its enforcement would be unconstitutional.[23] Cf. *Bank of*

[23] While petitioner does suggest (Br. 28-29) that enforcing Rule 29(c)'s time limits would violate his rights under the Due Process Clause of the Fifth Amendment, that claim lacks any merit. Far from denying petitioner due process of law, a rule that sets a clear and attainable time limit fully comports with the need for procedural regularity that is at the heart of the Due Process Clause. A legal system that lacked defined procedural deadlines would be chaotic and unmanageable. As for petitioner's claim (Br. 28-29) that the right to have a court grant a motion for judgment of acquittal made more than seven days after the discharge of the jury is "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325-326 (1937), that claim is defeated by the absence at common law of any tradition of granting post-verdict motions for judgment of acquittal. See pages 34-36, *supra*.

Nova Scotia, 487 U.S. at 255 (Rule 52 represents a "balance struck * * * between societal costs" and principles of finality on the one hand, "and the rights of the accused" on the other). As this Court explained in *Robinson* when faced with the analogous claim that enforcing the requirement that a notice of appeal be filed within ten days would be unjust:

> That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision. * * * Whatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it.

361 U.S. at 229-230. The district court in this case likewise had no basis for substituting its appraisal of the merits of a binding seven-day time limit for the determination reflected in Rule 29(c).

2. In any event, petitioner's assertion that enforcing the time limit set by Rule 29(c) would prevent the reversal of the conviction of an "actually innocent" defendant (Br. 9-14) is unfounded. Rather than

foreclosing review, enforcing the time limit set by Rule 29(c) simply shifts the forum in which a claim of insufficient evidence is litigated after the verdict, from the district court to the court of appeals. A defendant who fails to make a post-verdict motion for judgment of acquittal retains the right to claim on appeal that the evidence was insufficient as a matter of law. And, although petitioner failed to do so here, defendants typically file motions for judgments of acquittal under Rule 29(a) before a case is submitted to the jury but after the evidence on either side is closed, and, where such motions are denied, thus preserve their right to appellate review of evidentiary sufficiency even in the absence of a Rule 29(c) post-verdict motion. See *United States* v. *Overmyer*, 867 F.2d 937, 938 (6th Cir.) (same standard governs appeal from denial of Rule 29(a) motion as appeal from denial of Rule 29(c) motion), cert. denied, 493 U.S. 813 (1989). In the rare case of a defendant such as petitioner who has made no such motion, a claim of insufficient evidence is still reviewable on appeal, under a plain error standard of review. See generally *United States* v. *Olano*, 113 S. Ct. 1770 (1993). Petitioner thus will have the opportunity to establish on appeal that it was plain error for the district court not to dismiss the case on its own motion on the ground that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979).[34]

[34] The courts of appeals have consistently acknowledged the right of the defendant to plain error review of a claim of insufficient evidence where the defendant has failed to make a timely motion for judgment of acquittal in the district court. See *United States* v. *Santistevan*, 39 F.3d 250, 256-257 (10th Cir. 1994) (finding plain error); *United States* v. *Zolicoffer*, 869 F.2d 771, 774 (3d Cir.) (plain error), cert. denied, 490 U.S. 1113 (1989); see also *United States* v. *Muniz*, 60 F.3d 65, 67 (2d Cir. 1995) (no plain error); *United States* v. *Quintero-Barraza*, 57 F.3d 836, 843-844 (9th Cir. 1995) (no plain error); *United States* v. *Cox*, 957 F.2d 264, 265 (6th Cir. 1992) (no plain error); *Fagan*, 821 F.2d at 1009 & n.2 (no "manifest miscarriage of justice"); cf. *United States* v. *South*, 28 F.3d 619, 626 n.3 (7th Cir. 1994). There is, in fact, some uncertainty about whether the "plain error" standard for reviewing insufficiency claims first made on appeal differs from the standard for reviewing insufficiency claims properly preserved in the district court. See 2 Charles Alan Wright, *Federal Practice and Procedure (Criminal)* § 469, at 675 (2d ed. 1982); see also *United States* v. *Davis*, 583 F.2d 190, 199 (5th Cir. 1978) (Clark, J., concurring in part and dissenting in part). And contrary to petitioner's suggestion (Br. 12) that the *Jackson* v. *Virginia* standard governing claims of insufficient evidence applies only to claims raised in the court of appeals, that standard applies as well to post-verdict motions for judgment of acquittal made in the district court. See, *e.g.*, *Overmyer*, 867 F.2d at 938-939.

In addition, a defendant such as petitioner who claims (Br. 12) that the failure to make a timely motion under Rule 29(c) was the product of an unprofessional error by defense counsel may also be entitled to collateral relief under 28 U.S.C. 2255. If the defendant can establish that counsel's overall representation "fell below an objective standard of reasonableness," *Strickland* v. *Washington*, 466 U.S. 668, 688 (1984), and that there is a reasonable probability that, absent defense counsel's errors, the result in the case would have been different, *id.* at 694, the claim may be reviewed notwithstanding the defendant's procedural default. See *United States* v. *Frady*, 456 U.S. 152 (1982); cf. *Robinson*, 361 U.S. at 230 n.14; *Smith*, 331 U.S. at 475-476.

Also unavailing is petitioner's claim (Br. 12) that enforcing Rule 29(c)'s time limit would result in the

incarceration of a defendant whom the district court regards as not guilty pending resolution of his appeal. The provision that governs bail pending appeal, 18 U.S.C. 3143(b), authorizes a district court to release on bail a defendant who establishes that the appeal "raises a substantial question of law or fact likely to result in * * * (i) reversal, (ii) an order for a new trial, [or] (iii) a sentence that does not include a term of imprisonment." 18 U.S.C. 3143(b)(1)(B).[25] When a district judge believes that a post-verdict motion for judgment of acquittal would have had merit but for the untimeliness of that motion, it is likely that the judge will find the bail standard to have been met.

Petitioner suggests (Br. 19) that to honor a motion for judgment of acquittal filed only one day late would not offend the policies supporting Rule 29(c)'s time limit. But if jurisdictional time limits are to have any meaning, they must be strictly enforced.[26] Petitioner's "flexible" approach would defeat the systemic interest in the predictability of time limits, require

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[25] To release a convicted defendant on bail pending appeal, the district court must also find, by clear and convincing evidence, "that the [defendant] is not likely to flee or pose a danger to the safety of any other person or the community if released." 18 U.S.C. 3143(b)(1)(A).

[26] As this Court has noted in another context, "[i]f 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it. Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." *United States* v. *Locke*, 471 U.S. 84, 101 (1985).

district and appellate courts to undertake inquiries into whether particular delinquent filings were justified, and frequently delay appellate review. See *Robinson*, *supra* (affirming dismissal of appeal where notice of appeal filed 11 days late); *Berman*, *supra* (affirming dismissal of notice of appeal filed two days late); see also *Coleman* v. *Thompson*, 501 U.S. 722, 740 (1991) (denying collateral relief to defendant in capital case who filed notice of appeal three days beyond State's mandatory 30-day time limit); *Brown* v. *Allen*, 344 U.S. 443, 484-487 (1953) (denying collateral relief to defendant who filed notice of appeal one day beyond State's mandatory 60-day time limit); see also Fed. R. Crim. P. 2 (purpose of Federal Rules includes "the elimination of unjustifiable expense and delay"). Rule 29(c)'s time limit also has the effect of ensuring that motions for judgment of acquittal will be resolved before sentencing in all but the extraordinary case. That, in turn, reduces the possibility that the resolution of the Rule 29(c) motion might be colored by the district judge's heightened understanding by the time of sentencing of the defendant's background or likely sentencing range.[27]

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[27] Petitioner purports to cabin his proposed exception to Rule 29's time limit by proposing (Br. 22-23) that that limit be disregarded only when "(1) the motion is made prior to sentencing, (2) the motion was not timely filed because of an attorney's mistake and (3) there is a claim that the defendant is actually innocent." Petitioner's exception would swallow Rule 29(c), however, because his three conditions will almost always apply: a motion for judgment of acquittal is by definition a claim that the defendant is legally innocent; a motion will almost always be filed before sentencing; and a represented defendant who does not file a timely motion for acquittal can always claim that his attorney was responsible for that decision.

Rule 29(c) accounts for the occasional need of a defendant for additional time to prepare a motion for judgment of acquittal, or of a district court to consider the merits of granting such relief. See *Smith*, 331 U.S. at 475. It does so by allowing a defendant to seek extension of the seven-day time limit before that period has run, see Fed. R. Crim. P. 29(c), and by allowing a district court to reserve judgment on a pre-verdict motion until after the verdict, see Fed. R. Crim. P. 29(b). An open-ended invitation to further extensions, however, "is no insurance of justice." *Smith*, 331 U.S. at 476. As the Court has observed (*ibid.*):

> On the contrary, as time passes, the peculiar ability which the trial judge has to pass on the fairness of the trial is dissipated as the incidents and nuances of the trial leave his mind to give way to immediate business. It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision not be deferred until the trial's story has taken on the uncertainty and dimness of things long past.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The All Writs Act, 28 U.S.C. 1651, provides:

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

2. Rule 2, Fed. R. Crim. P., provides:

Rule 2. Purpose and Construction

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

3. Rule 33, Fed. R. Crim. P., provides:

Rule 33. New Trial

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the

judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

4. Rule 45, Fed. R. Crim. P., provides:

Rule 45. Time

(a) Computation. In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of some paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When a period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes New Year's Day, Birthday of Martin

Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.

[(c) Unaffected by Expiration of Term.] (Rescinded Feb. 28, 1966, eff. July 1, 1966.)

(d) For Motions; Affidavits. A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made

on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not less than 1 day before the hearing unless the court permits them to be served at a later time.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper is served by mail, 3 days shall be added to the prescribed period.

5. Rule 57, Fed. R. Crim. P., provides:

Rule 57. Rules by District Courts

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of the rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and

magistrate judges may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.